Supreme Court, U.S.
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No. 95-1150

In The

Supreme Court of the United States

October Term, 1995

J.A. CROSON COMPANY,

Petitioner,

v.

CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Ohio Twelfth Appellate District

RESPONDENT FOX MECHANICAL COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Respondent Fox Mechanical Co. is an Ohio corporation. Fox Mechanical Co. has no parent companies and no nonwholly owned subsidiaries.

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I. SUMMARY OF THE ARGUMENT

Contrary to the arguments of Petitioner J.A. Croson Company ("Croson"), the State of Ohio has not been deprived of its ability to prevent collusion among bidders on public works projects in Ohio. In fact, the Ohio courts below found as a matter of state law that the facts alleged by Croson, even if true, did not constitute collusion. Croson failed to state a claim under the Ohio statute prohibiting collusion among bidders, and dismissal of Croson's claims was required even without regard to issues of federal preemption. Therefore, this case does not merit this Court's attention because there were separate, independent state law grounds for dismissal of Croson's claims.

Moreover, contrary to Croson's alarmist rhetoric, no court below has found, and no party to this litigation has argued, that Ohio law prohibiting collusion during competitive bidding is preempted in its entirety by federal law. Rather, the holdings of the courts below are much more limited, namely that state law cannot be interpreted or applied to prohibit deduction of Union dues and participation in Union job targeting programs, which are expressly protected by federal law. No one questions that outside the specific, narrow context of collection and use of Union dues, Ohio laws affecting competitive bidding are fully applicable. Thus, the State of Ohio remains fully able to prevent collusion among bidders on public works projects.

This case involves Croson's claims that Respondent Fox Mechanical Company ("Fox") violated state law by engaging in activity expressly protected by federal law.

The conduct at issue is Fox's deduction of working dues pursuant to a lawful Union contract where the Union has established a "job targeting" program for which a portion of the dues are used. The Union uses these targeting funds to assist Union contractors in being competitive and obtaining more work for the Union's members. As repeatedly found by the courts below, this is a classic case of preemption. In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the U.S. Supreme Court held that states may not regulate an activity if that activity is either protected or prohibited by federal law. This is an easy case because job targeting programs have already been held to be protected by Section 7 of the National Labor Relations Act. *Manno Electric, Inc.*, NLRB Case No. 15-CA-11891 (July 20, 1994) (copy submitted). Moreover, as the Ohio courts have held, Croson's interpretation of state law would require contractors such as Fox to breach their duty to remit dues for job targeting programs under the applicable collective bargaining agreements, which would clearly be violative of federal law. Croson thus seeks to have the state control matters at the heart of collective bargaining, which is regulated by federal law. Because Croson's claims are preempted by federal law, this case was properly dismissed.

Croson further argues that an exception to preemption should apply because this case involves "matters deeply rooted in local interest". Croson's argument is belied by the fact that the Ohio Supreme Court has twice declined to exercise jurisdiction in cases involving these same issues, in this case and in *Independent Electrical Contractors of Greater Cincinnati, Inc. v. County of Hamilton, et al.*, (Case No. 95-770) (copy submitted). The Ohio

courts have repeatedly and ***unanimously*** held that state law challenges to job targeting programs are preempted by federal law. No less than ***five*** Ohio decisions have so held, including, in addition to the decisions of the trial court and the Court of Appeals in this action (Appendices A and C to Petitioner's Brief) the decisions of the trial court (Appendix F to Petitioner's Brief) and Court of Appeals in *IEC, supra,* (copy submitted) and the decision of the trial court in *J.A. Croson v. J.A. Guy, Inc., et al.* (Pickaway Cty. C.P. 1995) (Appendix G to Petitioner's Brief).

II. STATEMENT OF THE CASE

A. The Award of the Contract to Fox

This action involves the award of a contract for a construction project known as the Tolles Technical Center Expansion (the "Project"). Respondent Central Ohio Joint Vocational School District (the "School District") solicited proposals for labor and materials for construction of the Project, which proposals were required to be submitted on March 17, 1994. The bid of Fox on the Project was $277,900.00, while the bid of Croson was $293,449.00. Fox was thus the lowest bidder, with a bid over $15,000 lower than that of Croson. While Croson finished second, its bid was lower than the bids of two union contractors, Marco and Kirk Williams. Fox, as the lowest responsive and responsible bidder, was entitled to award of the contract and was awarded the contract.

Shortly after the bid results were announced, Croson filed a protest with the School District, which concluded that no collusion had occurred. Croson then initiated this

action on March 25, 1994 by filing a Complaint and Motion for Temporary Restraining Order. On April 5, 1994, the trial court held a hearing at which oral argument was heard from all counsel. The court subsequently issued its Decision and Entry dated April 11, 1994, addressing in detail Croson's allegations (Appendix B to Petitioner's Brief). The court found that Croson's allegations did not show that Fox or any other bidders on the contract had engaged in collusion or sham bidding in violation of R.C. 3313.46 or the Non-Collusion Affidavit (p. 8 of Decision).[1] The Court stated that "there is no basis to find that job targeting constitutes collusion within the affidavit factually or as a matter of law," (*Id.*, p. 9) and that the School District did not abuse its discretion in accepting Fox's bid (*Id.*, p. 10). The court also found that Croson's claims were preempted by federal law, which expressly permits and protects deduction of Union dues for job targeting (*Id.*, p. 7). On June 9, 1994,

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[1] R.C. 3313.46 provides, in pertinent part, as follows: "When there is reason to believe there is collusion or combination among bidders, or any number of them, the bids of those concerned therein shall be rejected." The purpose of the Non-Collusion Affidavit is likewise to prevent collusion among bidders or the submission of sham bids. Collusion among bidders might be present, for example, if two bidders agreed in advance on their bid prices. Similarly, sham bidding might exist if bidders agreed that one or more bids would be submitted only to create the appearance of competition. Even if the allegations of the Complaint are taken as true, there has been no showing of collusion or a violation of R.C. 3313.46. Croson has not alleged that Fox even talked to, let alone entered into an agreement with or colluded with, any other bidder. The trial court thus correctly found that Croson's allegations, even if true, do not show collusion or sham bidding.

the trial court issued its Decision denying Croson leave to amend its complaint to add a damages claim and granting judgment on the pleadings for the reasons set forth in its previous decision (Appendix C to Petitioner's Brief). In its Decision, the court expressly found that "job targeting is not collusive as a matter of law."

The trial court's decision was affirmed by the Court of Appeals in its decision dated May 30, 1995 (Appendix A to Petitioner's Brief). The Court found that Croson's cause of action, based on state law, was preempted "because it involves activity arguably protected under section 7 of the NLRA" (p. 10 of Opinion). The court explained: "Application of R.C. 3313.46 in this case would allow a state court to regulate the procedure by which a union administers job targeting."

B. Job Targeting

As noted, the trial court found that even assuming Croson's allegations were true, job targeting is not collusive. The court so found because Croson merely alleged that Fox had participated in a job targeting program under which Fox deducted Union dues which would be used to defray labor costs of a Union contractor that was the successful bidder.

Job targeting is a program designed by the Union to level the playing field between Union and non-Union contractors and increase the competitiveness of Union contractors bidding on contracts. The program works by using Union dues for payments to defray a Union contractor's costs and make the Union contractor competitive even though the Union contractor pays traditionally

higher Union wages. The targeting funds are working dues deducted from the paychecks of each Union member, pursuant to voluntary Union membership approval. (See Complaint, ¶14, Appendix A hereto).

The targeting program was carefully designed by the Union to promote competitive bidding and to preserve the secrecy of bids. Before preparing a bid, the contractor submits a form titled a "Request for Target" to the Union identifying the project and providing a preliminary estimate of hours of labor for the project (Complaint, ¶15). The Union then informs the contractor of whether the project is targeted and if so, the amount available to defray costs. (Complaint, ¶17). Any contractor can then submit a bid. At the time of submission of the bid, the contractor writes the number of hours included in the bid on a card which is placed in a sealed envelope and held by the Union, unopened, until after the bid opening. At no time prior to the bid opening is the bid or any element of the bid disclosed to the Union or any other party. Similarly, neither the bid price nor any element of the bid price is fixed by agreement with the Union or anyone else.

Contrary to the assertions in Croson's brief (at page 5), union contractors participating in the targeting program ***do not*** disclose or receive information about the bids of other union contractors. Croson's complaint does not even allege that such information is shared by union contractors bidding on the particular project. As shown by a review of the allegations of the complaint, it is undisputed that at no time prior to the bid opening is the contractor's bid or any element of the bid disclosed to the Union or any other party. Similarly, neither the bid price

nor any element of the bid price is fixed by agreement with the Union or anyone else. The Union is provided only a preliminary estimate of the number of hours prior to preparation of the bid, and the actual number of hours estimated as part of the bid is kept in an unopened envelope.

Croson clearly recognizes the dilemma it faces, trying to create the appearance of collusion when there is no allegation or evidence that Fox had any communications whatsoever with any other bidder. In an effort to cover this fatal flaw in its case, Croson strains to interpret the Non-Collusion Affidavit to mean that no bidder can discuss any element of the work on the project with a third party. The language of the Affidavit must be interpreted in context, insofar as the Affidavit is designed to prevent collusion or other activity that would interfere with competitive bidding. As the Respondent School District concluded in rejecting Croson's protest and awarding the contract to Fox, participation in the targeting program did not constitute collusion or a violation of the Non-Collusion Affidavit. Rather, job targeting merely provides a discount or per-hour subsidy of a contractor's labor costs, just like a discount negotiated between a contractor and a supplier of materials necessary for performance of the contract. The targeting subsidy does not "fix" the bidder's bid price, as the number of hours necessary to complete the project as well as all other aspects of the bid are calculated independently by each bidder.

As found by the trial court, Croson's allegations of participation in the Union job targeting program do not show collusion or a violation of R.C. 3313.46. The courts

below also correctly found that Croson's claims are also preempted by federal law.

III. ARGUMENT

The two propositions of law contained in Croson's brief are substantively the same, in that they both present the issue of whether a state law challenge to participation in job targeting programs is preempted by federal law. The two propositions of law will therefore be addressed together here.

A. Croson's Claims are Preempted under Garmon

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court held that states may not regulate activities which federal labor law protects or prohibits or which federal law even "arguably" protects or prohibits. Preemption applies not only where there is a conflict between state and federal law, but also when there is a mere potential for conflict. *Id.* at 246. The *Garmon* rule was reaffirmed in *Building & Constr. Trades Council v. Associated Bldrs.*, 507 U.S. 218 (1993), the Supreme Court's most recent statement on preemption. The Court stated: "When we say the NLRA preempts state law, we mean that the NLRA *prevents a State from regulating within a protected zone.*" *Id.* (emphasis added).

The activities involved here – the check-off of union dues under a collective bargaining agreement, and use of the dues – are clearly within this protected zone. This Court's decision in *Communication Workers v. Beck*, 487

U.S. 735 (1988), is dispositive. *Beck* held that issues over the collection and use of union dues, fees and assessments, and claims against an employer about the collection and use of such funds, are governed by § 8 of the NLRA and preempted under *Garmon*. *Id.* at 742. The Court said that a claim about these activities "falls squarely within the primary jurisdiction of the [NLRB]." *Id.* The Court found that a challenge to the use of union dues for purposes other than collective bargaining is subject to Section 8 and therefore preempted under *Garmon*.

As interpreted by Croson, R.C. 3313.46 and the Non-Collusion Affidavit would prohibit the exact conduct that the NLRA authorizes and specifically protects. This requires preemption. Fox's check-off of Local 189's dues is not only regulated by the NLRA/LMRA and therefore in the "zone" of *Garmon* preemption, but is in fact specifically protected by those laws. *Manno Electric, Inc., supra* (copy submitted). In *Manno*, a non-union contractor filed a state court lawsuit seeking to prohibit job targeting under several state law theories. *Manno* found that the plaintiff's state law claims were preempted and that the filing of the state court lawsuit interfered with activities protected by the NLRA:

> The objectives of the job targeting program are to protect employees' jobs and wage scales. These objectives are protected by Section 7. Thus, the plaintiff's [state court] suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a)(1) of the (National Labor Relations) Act. The claims which the Plaintiff sought to press were preempted. [Opinion, p. 30].

This authority stands for the proposition that targeting programs are protected by federal law and any state law is preempted to the extent that it impairs such federally protected activity. *See also IBEW, and the Fred B. Debra Co.*, NLRB Case No. 9-CB-8493 (July 21, 1993), affirmed (Oct. 4, 1993) (copy submitted) (where the NLRB general counsel found that the check-off of union dues for job targeting is authorized and within the protection of NLRA § 8).

Further, Fox could comply with Ohio law as Croson interprets it only by breaching its collective bargaining agreement, which is itself a violation of federal labor law. It is well-established that an employer who ceases to deduct and remit union dues and other payments called for by a collective bargaining agreement violates NLRA §§ 8(a)(1) and (5). *Shen-Mar Food Products, Inc.*, 221 N.L.R.B. 1329, enforced as modified 557 F.2d 396 (4th Cir. 1977). Croson's claim is therefore preempted under *Garmon*.

Croson's argument that the activity involved in this case has no relationship to employer-employee relations or collective bargaining has no merit. The exclusive purpose of the job targeting program goes to the very heart of the union's collective bargaining and representational functions. The local union established its job targeting program in order to protect, preserve, and expand the share of the mechanical construction market which provides employment opportunities for its members. There is nothing more fundamental to a Union's function as an exclusive bargaining representative than activities intended to increase employment opportunities for its members. As stated by the Administrative Law Judge in *Manno Electric, supra*, "The objectives of the job targeting

program are to protect employees' jobs and wage scales. These objectives are protected by Section 7 [of the NLRA]." These objectives are also critical to the function of the Union. It is eminently clear that the working dues deducted by Respondent from the wages of its employees used by the Union to finance its job targeting are collected from each member on a regular basis, as opposed to payments that are not susceptible of anticipation as a regularly recurring obligation, and they are requisite to retention of membership in the Union. Moreover, the dues are collected pursuant to membership approval and under voluntarily signed authorizations for dues check-off.

Croson further argues that this case fits within an exception to the *Garmon* rule for conduct of "only peripheral concern to federal law or . . . deeply rooted in local feeling and responsibility." This Court has held that this exception is narrow and requires a balancing of the state's interest in controlling the conduct against the risk that the state will sanction conduct which the NLRA protects. *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-499 (1983). The state's interest in controlling conduct already found by the trial court not to constitute collusion in no way compares to the importance of protecting conduct permitted and expressly protected by federal law. As the Court of Appeals found, "The conduct involved in this case, however, does not implicate a state interest of greater weight than the federal interest in the uniformity of its labor policy." (Appendix A to Petitioner's Brief, p. 8a). Moreover, Croson's argument that this case is "deeply rooted in local feeling and responsibility" ignores the fact that the Ohio Supreme Court has twice exercised its

discretion to decline jurisdiction in cases involving these same issues, in this case (Appendix D to Petitioner's Brief) and in *Independent Electrical Contractors of Greater Cincinnati, Inc. v. County of Hamilton, et al.* (Case No. 95-770) (copy submitted).

Croson also argues that its claims are not preempted because it is not challenging the legality of job targeting *per se*. Rather, Croson alleges that the way job targeting is implemented violates the Non-Collusion Affidavit and Ohio's competitive bidding statute. In properly rejecting this same argument below, the Court of Appeals stated:

> We find that distinction to be illusory. In *Manno, supra*, the plaintiff did not challenge job targeting directly, but alleged that the union and its members engaged in job targeting with the intent of harassing the plaintiff and injuring his business. The ALJ determined that such a challenge interfered with and restrained the union in their Section 7 rights and was preempted.
>
> (p. 8 of Opinion)

B. Preemption Under the Supremacy Clause

Because federal law permits the use of union dues for job targeting, any state law that would conflict with federal law is preempted. Croson's claims are thus also preempted under the Supremacy Clause.

Congress' pervasive regulation of financial transactions between employers and labor organizations is embodied in LMRA § 302. LMRA § 302(a) prohibits any payment from an employer to a union if the union represents or seeks to represent any of the employer's

employees. 29 U.S.C. § 186(a). The prohibitions of § 302(a) are tempered only by the specific exceptions found at § 302(c), 29 U.S.C. § 186(c). LMRA § 302(c)(4) expressly authorizes employer payments to labor organizations made pursuant to the terms of "dues check-off" arrangements:

> The provisions of this section shall not be applicable . . . (4) *with respect to money deducted from the wages of employees in payment of membership dues* in a labor organization. . . . (emphasis added).

Federal authorities have interpreted the term "membership dues" in Section 302(c)(4) to include the type of deduction here, for job targeting. Courts have held that this section permits the deduction of Union dues or special assessments from employee wages. *See International Union of Mine Mill Workers Local 515 v. American Zinc, Lead and Smelting*, 311 F.2d 656 (9th Cir. 1963) and *In Re International Brotherhood of Electrical Workers*, Case No. 9-CB-8493 (July 21, 1993) (holding that the use of Union dues for job targeting is permitted by federal law) (copy submitted). This issue has also been addressed by the U.S. Department of Justice, the federal agency charged with enforcement of § 302. The Justice Department's opinion, found at 22 LRRM (BNA) 46 (1948), concludes that " . . . [I]nitiation fees and assessments, being incidents of membership, should be considered as falling within the classification of 'membership dues'." (copy submitted). Thus, applying the construction of LMRA § 302(c)(4) adopted by the Justice Department, the NLRB and the courts, it is clear that federal law protects

employer deduction of "dues" and "assessments", including funds for job targeting.

Under the most basic form of preemption, traditional Supremacy Clause preemption, federal law preempts any conflicting state law. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Brown v. Hotel and Restaurant Employees*, 468 U.S. 491, 502 (1984). Because federal law permits the use of dues for targeting, any state law that would conflict with federal law is preempted. Therefore, if R.C. 3313.46 and the Non-Collusion Affidavit were interpreted to prohibit job targeting, they would be preempted by federal law.

C. Preemption by Federal Occupation of the Field

Croson's claims are preempted for the additional reason that the deduction and use of Union dues is an area which has been federally occupied to such an extent that no room remains for state regulation. In *International Brotherhood of Operative Potters v. Tell City Chair Co.*, 295 F. Supp. 961 (S.D. Ind. 1968), the defendant employer claimed that state law was controlling as to the validity of employee authorization of certain dues and assessments. The court held:

> The issue of pre-emption thus hinges upon the extent of the regulation of check-offs undertaken by Congress. Check-offs are regulated primarily by § 302 of the L.M.R.A., which specifies the conditions necessary for a valid check-off, and provides for both injunctive relief and criminal penalties. Additionally, the National Labor Relations Board has authority to regulate check-offs under Section 8 of the L.M.R.A. *N.L.R.B. v.*

> *Penn Cork and Closures, Inc.*, 376 F.2d 52 (2d Cir. 1967). ***It thus appears that Congressional regulation of the area of check-offs is . . . pervasive and encompassing.*** . . . *Automobile Workers v. O'Brien*, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978 (1950). [295 F. Supp. at 965; emphasis added]

See also State of Utah v. Montgomery Ward, 120 Utah 294, 233 P.2d 685, 689, *cert. den.*, 342 U.S. 869 (1951) (holding that ***"It is difficult to conceive how Congress could have more fully occupied the field of legislation in regard to the check-off than it has done in sec. 302 of the L.M.R.A."***; emphasis added); and *SeaPak v. Industrial, Technical & Professional Employees*, 300 F. Supp. 1197 (S.D. Ga. 1969), *aff'd*, 423 F.2d 1229 (5th Cir. 1987), *aff'd*, 400 U.S. 985 (1971) (holding that the area of dues check-off is federally occupied to such an extent that no room remains for state regulation in this area).

If interpreted to prohibit deduction or use of Union dues for job targeting, R.C. 3313.46 and the Non-Collusion Affidavit would constitute an impermissible attempt to regulate in an area that has been federally occupied to such an extent that no room remains for state regulation in the same field.

D. The Ohio Decisions Unanimously Establish that Croson's Claims are Preempted

The decisions of the trial court and Court of Appeals in *IEC, supra*, and the trial court in *Croson, supra*, are *directly* on point on the preemption issues raised in Croson's brief. The plaintiffs in those cases claimed, like Croson claims here, that union dues deductions to fund a "job targeting program" violated Ohio law.

The decision of the Court of Appeals for the First Appellate District in *IEC* is compelling (copy submitted). The court began by citing to *Garmon, supra,* which holds that preemption applies when an activity is arguably subject to Section 7 or 8 of the NLRA. The court noted that in that case (as in this case) the defendant employer was obligated by a collective bargaining agreement to deduct the targeting funds. The court cited to well-settled principles of labor law providing that when an employer ceases to deduct amounts required to be deducted under a collective bargaining agreement, this constitutes a violation of section 8 of the NLRA. The court then held:

> Application of the Prevailing Wage Law as argued by IEC would allow the state to regulate the amount of union dues which could be withheld from members' paychecks and the purposes to which those dues could be put. . . . [IEC] actually seeks to have the state control matters at the heart of the collective-bargaining process, which is regulated by the NLRA. ***Under IEC's interpretation, ESI could only comply with the Prevailing Wage Law by breaching its duty to remit union dues under the collective bargaining agreement, a violation of section 8 of the NLRA***. Therefore, we conclude that the issue is preempted under *Garmon*.
>
> (Opinion, p. 8; Emphasis added).

The analysis of the *IEC* court is supported and followed by the analysis of the Court of Appeals for the Twelfth Appellate District in the instant case (Appendix A to Petitioner's Brief). Starting the analysis with *Garmon,* the court stated that when activities sought to be regulated by a state are arguably protected under Section 7 of

the NLRA, preemption applies. The court then cited authority holding that job targeting programs were an activity protected under Section 7 of the NLRA. The court then held:

> Application of [state law] in this case would allow a state court to regulate the procedure by which a union administers job targeting. . . . [T]he trial court did not err in finding that Croson's state law cause of action would be preempted because it involves activity arguably protected under Section 7 of the NLRA. (opinion, p. 10).

See also Croson v. J.A. Guy, supra, in which the trial court properly followed the decisions reviewed above and dismissed a state law challenge by Croson to job targeting. (Appendix G to Petitioner's Brief).

Thus, the Ohio courts have unanimously concluded that a claim that deduction of Union dues for job targeting is violative of state law is preempted by federal law. As established by the review of the law of preemption above, these decisions are unquestionably correct.

E. The Ohio Decisions Are Not in Conflict With Federal Authority

Croson argues that the above Ohio decisions are in conflict with federal authority, referring to *Building and Construction Trades Dept. v. Reich,* 40 F.3d 1275 (D.C. Cir. 1994) and *International Brotherhood of Electrical Workers, Local 357 v. Brock,* 68 F.3d 1194 (9th Cir. 1995). Both *Reich* and *Brock* are completely inapposite, as they have ***nothing whatsoever to do with preemption***. Croson erroneously

cites *Brock* (at page 19 of Petitioner's Brief) as holding that preemption did not apply in that case. To the contrary, *Brock*, just like *Reich*, was decided solely under federal law. Both *Reich* and *Brock* were decided under the Davis-Bacon Act, which has no relevance here. There was simply no issue of federal preemption of state law in either case. Croson nonetheless argues that the two cases are relevant because "preemption would apply to both state and federal courts." (Brief, p. 20). Croson entirely misses the point. Regardless of whether preemption applies to both federal and state ***courts***, preemption applies only to state but not federal ***law***.

Reich and *Brock* are inapposite for the additional reason that their holdings are based on the distinction between dues and assessments under the Davis-Bacon Act, 40 U.S.C. § 76, *et seq*. The distinction between dues and assessments simply has no relevance to preemption under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The check-off and collection of union dues *or* assessments under a collective bargaining agreement, and their intended use – are clearly within the "protected zone" of *Garmon* preemption. *Communication Workers v. Beck*, 487 U.S. 735 (1988). Moreover, regardless of any distinction between dues and assessments, preemption applies under the doctrine of federal occupation of the field. The area of check-offs of dues and assessments has been federally occupied to such an extent that no room remains for state regulation. *International Brotherhood of Operative Potters v. Tell City Chair Co.*, 295 F. Supp. 961 (S.D. Ind. 1968); *State of Utah v. Montgomery*

Ward & Co., 120 Utah 294, 233 P.2d 685, *cert. denied*, 342 U.S. 869 (1951).[2]

Croson has also attempted to avoid preemption and circumvent the Ohio decisions addressing these issues by relying upon *Associated Builders and Contractors of Georgia, Inc. v. City of Atlanta*, 1995 WL 606778 (N.D. Ga. 1995), *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), and *Beckwith v. United States Parcel Service*, 889 F.2d 344 (1st Cir. 1989). However, these cases have no relevance here.

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[2] Croson also cites to an unpublished draft of a law review article, *Subsidizing Contractors to Gain Employment: Construction Union "Job Targeting,"* 17 U.C. Berkeley J. of Employment & Labor Law (forthcoming). Croson argues that the views expressed by the author of the draft article should somehow be taken as authority with precedence over the decisions of five Ohio courts that have addressed these issues. The author of the draft article, after discussing the preemption issue, states, inconclusively, that "it remains to be seen what the eventual consensus will be" on this issue (Appendix to Petitioner's Brief, p. 109). Notwithstanding the questions raised by the author of the draft article regarding the decisions by the Ohio Courts of Appeal, the Ohio Supreme Court has since twice declined jurisdiction over cases holding that the same claims presented by Appellant are preempted. *J.A. Croson Company v. Central Ohio Joint Vocational School District, et al.*, Supreme Court of Ohio, Case No. 95-1422 (jurisdictional motion overruled, October 18, 1995) (Appendix D to Petitioner's Brief); *Independent Electrical Contractors of Greater Cincinnati, Inc. v. County of Hamilton, et al.*, Supreme Court of Ohio, Case No. 95-770 (jurisdictional motion overruled, July 19, 1995) (copy submitted). The author of the article simply misses the point that if a court were to apply state law to prohibit deduction of dues for job targeting the court would be distinguishing between "good union dues" and "bad union dues" and thereby trespassing on federal labor preemption.

As set forth above, Croson's claim is preempted because state law conflicts with federal law with respect to deduction of dues and because federal law occupies the field with respect to regulation of deduction of union dues. Thus, preemption hinges on the fact that this case involves deduction of union dues. Neither *Associated Builders, Belknap,* nor *Beckwith* has anything to do with deduction of union dues. Thus, the basis for preemption here is simply not addressed in those cases, and they are completely inapposite.

Associated Builders and Contractors merely holds that a local prevailing wage law was not preempted ***in its entirety*** by the NLRA. That case simply did not address whether the prevailing wage statute could be interpreted or applied to prohibit *deduction of Union dues and assessments,* which is expressly protected by federal law. Moreover, the reasoning of the Court in *Associated Builders and Contractors* clearly does not apply under Ohio law. The court in that case held that a local prevailing wage law was not preempted in its entirety because it constituted a "minimum wage law". The Ohio Supreme Court has repeatedly held that the Ohio Prevailing Wage Statute does not constitute a "minimum wage law". *Harris v. Atlas Single Ply Systems, Inc.,* 64 Ohio St. 3d 171, 173-174 (1992); *Craig v. Youngstown,* 162 Ohio St. 215, 221 (1954).

Belknap is similarly inapposite. *Belknap* involved claims by discharged replacement workers that the employer had violated promises to them that they would not be discharged when a strike was settled. The Court held that preemption did not apply because the NLRA addresses the rights of the strikers, not the replacement workers. This holding obviously has no relevance here.

Croson nevertheless cites the statement by the court that where conduct is said to be arguably prohibited by the NLRA, one inquiry in the preemption analysis is whether the controversy presented to the state court is identical with that which could be presented to the Board. Here the conduct at issue, participation in job targeting programs through deduction of dues for use to defray labor costs, is identical to that presented to the Board and held to be protected in *Manno Electric*. Moreover, the *Belknap* test of whether conduct arguably prohibited by the NLRA is identical to that which could be presented to the Board has no relevance where, as here, state law is claimed to prohibit conduct which is expressly protected by federal law.

In *Beckwith, supra,* the court upheld a state statute which prevented employers from satisfying debts owed to them by their employees by withholding amounts from employees' paychecks. Again, that case did not involve union dues or amounts required to be deducted pursuant to a collective bargaining agreement.

For the foregoing reasons, the authority cited by Croson does not conflict with the Ohio decisions holding that state law restrictions on deduction of dues for job targeting are preempted by federal law.

F. This Case Involves a Statute of General Application Rather Than the State's Authority to Act as a Market Participant

Croson relies upon *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Mass.*, 507 U.S. 218, (1993), for the

proposition that Croson's claims are not preempted because the State of Ohio is allegedly acting as a market participant, rather than a regulator. This argument has no merit.

In *Building and Construction Trades Council, supra,* the state sought to enforce a bid specification on a *specific* job which required that contractors adhere to a union prehire agreement. The Court held that such a requirement was not preempted by federal law because the prehire agreement which the state sought to enforce was expressly permitted by NLRA §§ 8(e) and (f), 29 U.S.C. §§ 158(e) and (f), and that the state, as a market participant, could use such an agreement in seeking employees for a particular project. The Court declined to address the issue of whether its holding would apply if the state's action violated the NLRA, holding that certiorari was not granted on that issue. *Id.*, 113 S. Ct. at 1198, n.2.

The fundamental flaw in Croson's attempt to apply *Building and Construction Trades Council* to this case is that the restrictions which are claimed by Croson to prohibit job targeting are not imposed by the Central Ohio Joint Vocational School District acting on its own initiative as a market participant. Here, the requirements preempted by federal law are purportedly imposed by the State through the competitive bidding statute, R.C. 3313.46. As such, this is a classic example of the state acting as a regulator rather than a market participant, by enacting a law that applies to *all* public jobs in the State of Ohio.

Under Croson's interpretation of Ohio law, the State is attempting to regulate, by means of a statute of general application, the types of dues which may be collected by

the Union. Moreover, as shown by a review of the language of the Non-Collusion Affidavit, the Affidavit is obviously intended to effectuate the requirements of the statute, R.C. 3313.46. The language of the affidavit closely tracks the language of the statute. As the trial court concluded, the Respondent Central Ohio Joint Vocational School District properly exercised its discretion in concluding that Respondent Fox complied with the Non-Collusion Affidavit and was the lowest responsive bidder. *See Cedar Bay Construction, Inc. v. Fremont*, 50 Ohio St. 3d 19, 21 (1990) (holding that an abuse of discretion standard applies to the review of an administrative action in competitive bidding cases); *Dayton ex rel. Scandrick v. McGee*, 67 Ohio St. 2d 356, 359 (1981).

G. The Decision of the Court Below Does Not Interfere with the State of Ohio's Ability to Prevent Collusion Among Bidders on Public Projects

Croson argues that this Court should use this case as an opportunity to protect the public policy behind competitive bidding. However, no party has argued that the Ohio statute regarding competitive bidding, R.C. 3313.46, is preempted in its entirety by federal law. Rather, the argument is much different and much more limited, namely that state law cannot be interpreted or applied to prohibit *deduction of Union dues and participation in job targeting*, which is expressly protected by federal law. Fox does not question that outside the specific, narrow context of collection and use of Union dues, Ohio laws affecting competitive bidding are fully applicable. Moreover, while Croson claims that this case merits review

because of the importance of preventing collusion, it is noteworthy that the trial court addressed the substance of Croson's allegations in detail and concluded that even if true, the allegations do not show collusion. As noted, Croson does not even allege that Fox talked to, entered into any agreements with, or colluded with any other bidders.

Nevertheless arguing that this case stimulates public interest, Croson claims that the decisions emanating from the courts of appeal are not consistent. In fact, the Ohio courts have repeatedly and ***unanimously*** held that state law challenges to job targeting programs are preempted by federal law. As discussed above, no less than ***five*** Ohio decisions have so held. Croson has not cited, and cannot cite any decisions to the contrary. The issues raised by Croson are thus by no means novel or unsettled.

Croson also argues that the holdings of the courts below create an improper distinction between private and public entities in their abilities to prevent collusion during competitive bidding. As noted above, no court below and no party to this action has questioned the ability of any public entity to prevent collusion during competitive bidding. In any event, any distinction between the rights of private and public entities necessarily arises from the fact that the applicable statute itself, R.C. 3313.46, restricts competitive bidding only on public projects. Thus, any purported distinction between the rights of public and private owners arises not from the decisions of the courts below but from the statute itself.

IV. CONCLUSION

For the foregoing reasons, the Court should decline to exercise jurisdiction over the instant action.

Respectfully submitted,

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IN THE COURT OF COMMON PLEAS
MADISON COUNTY, OHIO

J.A. CROSON COMPANY, 2130 Franklin Road Columbus, Ohio 43209, Plaintiff, v. CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT, 7877 Rt. 42 N.E. Plain City, Ohio 43064 Defendant.	:	Case No. Judge Robert D. Nichols

VERIFIED COMPLAINT

FIRST CAUSE OF ACTION (INJUNCTION)

1. Plaintiff J.A. Croson Company ("Croson") is a qualified, competent and experienced general contractor.

2. Defendant Central Ohio Joint Vocational School District ("Central Ohio") solicited proposals for labor and/or materials described in a document prepared by Central Ohio (hereinafter referred to as "RFP").

3. The RFP involved a project commonly referred to by Central Ohio as the Tolles Technical Center Expansion (hereinafter referred to as the "Project").

4. Croson submitted a proposal for the Project.

5. Upon information and belief, Croson asserts that it submitted a proposal which was the lowest, most

responsive and cost effective proposal received by Central Ohio, and Croson was the most responsible company that submitted a bid.

6. Defendant Central Ohio was legally obligated to award the contract to Croson because it was the lowest, most responsive and responsible company submitting a proposal, and its proposal was the most cost effective proposal.

7. Upon information and belief, Defendant Central Ohio has rejected Croson's proposal.

8. Upon information and belief, Central Ohio asserts that Defendant may award the contract in dispute to Fox Mechanical, another bidder for the Project.

9. Fox Mechanical's base bid was $277,900.00 and J. A. Croson's base bid was $293,449.00. See Exhibit "A" attached hereto.

10. The proposal submitted by Fox Mechanical does not reflect Fox Mechanical's actual costs for this job.

11. Upon information and belief, J. A. Croson has reason to believe that Fox Mechanical has violated the non-collusion affidavit that was required to be submitted with the bid.

12. The non-collusion affidavit states in relevant part as follows:

> [T]hat said bidder has not in *any manner, directly or indirectly, sought by agreement, communication or conference with any one* to fix the bid rice (sic) of said bidder or of any other Bidder, *or to fix any overhead, profit, or cost element of such Bid price,* or of that of any other Bidder, *or to secure*

> *any advantage against* the owner awarding the contract or *anyone interested in the proposed contract*. . . .

Non-Collusion Affidavit (emphasis added). See Exhibit "B" attached hereto.

13. Upon information and belief, Plumbers Local 189 and the union contractors who are signatory to their collective bargaining agreement have set up a job targeting program ("program").

14. Upon information and belief, the program is funded by a 2% assessment against all union members who are required to pay into this fund.

15. Upon information and belief, the targeting program operates by having any union contractor request that a specific job be "targeted".

16. Upon information and belief, if Local 189 agrees to target a job, then it advises all union contractors that the job has been "targeted".

17. Upon information and belief, by targeting a job Local 189 agrees that it will pay out of the job targeting fund a kickback to any union contractor who is awarded the job a specific dollar amount based upon a specific hourly rate.

18. Upon information and belief, if Local 189 agrees to a $6.00 per hour kickback, the union contractor who is awarded the contract gets a monthly check from the union at a rate of $6.00 per hour for every hour a union member works on the job.

19. Upon information and belief, under the targeting program Fox Mechanical, who is required by the bid

documents to pay a prevailing wage rate of $21.09 per hour has an actual labor cost of $15.09 per hour, as a result of its fixing overhead cost and creating for itself an unfair competitive edge by avoiding prevailing wage laws, and avoiding disclosing the names of each person having an interest in the bid proposal at issue.

20. Upon information and belief, Croson asserts that the rejection of its proposal was based on incomplete, inaccurate, and otherwise misleading facts.

21. Upon information and belief, Croson asserts that the process used to reject its proposal was arbitrary and inconsistent with the applicable law.

22. Croson has requested that Defendant Central Ohio not award a contract to another company for the Project.

23. Upon information and belief, Croson asserts that Defendant Central Ohio plans to award the contract to a less qualified company for the Project.

24. Croson and the taxpayers of Ohio will be irreparably harmed if Defendant Central Ohio refuses to award the contract to Croson, and Defendant enters into a contract with another company for the Project.

25. Croson has no adequate remedy at law and no means of identifying the damage to its business, its reputation, its profits, and its employee morale caused by the actions and threatened actions of Defendant.

SECOND CAUSE OF ACTION (MANDAMUS/ DECLARATORY JUDGMENT)

26. Croson repeats and incorporates the allegations contained in the above paragraphs to the same extent as if fully rewritten herein.

27. Defendant Central Ohio has a mandatory legal duty to award the contract to Croson, the most responsive and responsible company submitting the lowest price proposal which complies with the applicable plans and specifications for the Project.

28. Defendant Central Ohio has failed and refused to honor this legal obligation, despite repeated demands by Croson for Defendant to do so.

29. Croson has no plain and adequate remedy in the ordinary course of the law.

THIRD CAUSE OF ACTION (MANDAMUS/DECLARATORY JUDGMENT)

30. Croson repeats and incorporates the allegations contained in the above paragraphs to the same extent as fully rewritten herein.

31. Croson, on behalf of themselves and all other taxpayers of the State of Ohio, complain of Defendant Central Ohio conduct and for Croson's cause of action allege the following.

32. At all relevant times mentioned in this Complaint, Croson has provided general contracting services to various clients in Central Ohio.

33. It is impractical for all taxpayers of the state of Ohio to bring Defendant Central Ohio before this Court; therefore, Croson brings this action on behalf of itself and on behalf of all other taxpayers of the state of Ohio similarly situated.

34. Upon information and belief, at all relevant times mentioned in this Complaint, Defendant was an agency created under the laws of the state of Ohio and charged with, among other duties, planning, supervising and letting of contracts for projects for Central Ohio, including construction contracts as described throughout this Complaint.

35. Upon information and belief, Plaintiff asserts that even though Croson was the lowest, most responsive and responsible company seeking the contract at issue regarding the Project, and even though Croson submitted the most cost effective proposal for the project, Defendant intends to award the contract to another bidder.

36. Upon information and belief Croson asserts that Defendant intends to award the contract at issue regarding the Project to Fox Mechanical even though Fox Mechanical failed to satisfy relevant and mandatory requirements contained in the RFP, and failed to demonstrate that it is the most qualified company to perform the contract.

37. Upon information and belief Croson asserts that Defendant's factual basis for rejecting Croson's bid was in large part inaccurate, incomplete and otherwise misleading, and that this rejection was done in an arbitrary manner.

WHEREFORE, Plaintiff respectfully requests that this Court grant judgment in favor of Croson and against Defendant as follows:

(1) that a temporary restraining order, preliminary injunction and permanent injunction be issued restraining Defendant, its agents, officers, servants, employees and all other persons acting on behalf of or in concert with Defendant from accepting proposals other than Croson's proposal, or from awarding, signing or executing any contract with a third party for the work (or authorizing third parties to proceed with such work) that is the subject of the contract for the Project,

(2) that a writ of mandamus be issued directing the Defendant to honor the proposal of Croson and execute a written contract with Croson because it is the lowest, most responsive and responsible company submitting a cost effective proposal for the Project, and that Defendant be ordered to immediately proceed with its obligations,

(3) that the Court enter a declaratory judgment declaring that the evaluation process (with respect to the Project) was not conducted in accordance with law, that Croson submitted the lowest, most responsive and cost effective proposal, Croson is the most responsible company submitting a proposal, and that Croson is entitled to the contract for the Project,

(4) that Croson recover its attorney fees, costs and expenses incurred in maintaining this action, and

(5) that this Court order such further relief which it deems appropriate.

Respectfully submitted,

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VERIFICATION

_____, representative of J.A. Croson Company, states that they have read the foregoing Complaint, that this verification is upon their own knowledge, information and belief, and that they believe the allegations in the foregoing Complaint to be true.

J.A. Croson Company

By: _____

Sworn to before me and subscribed in my presence this ___ day of ___, 1994.

_____
Notary Public